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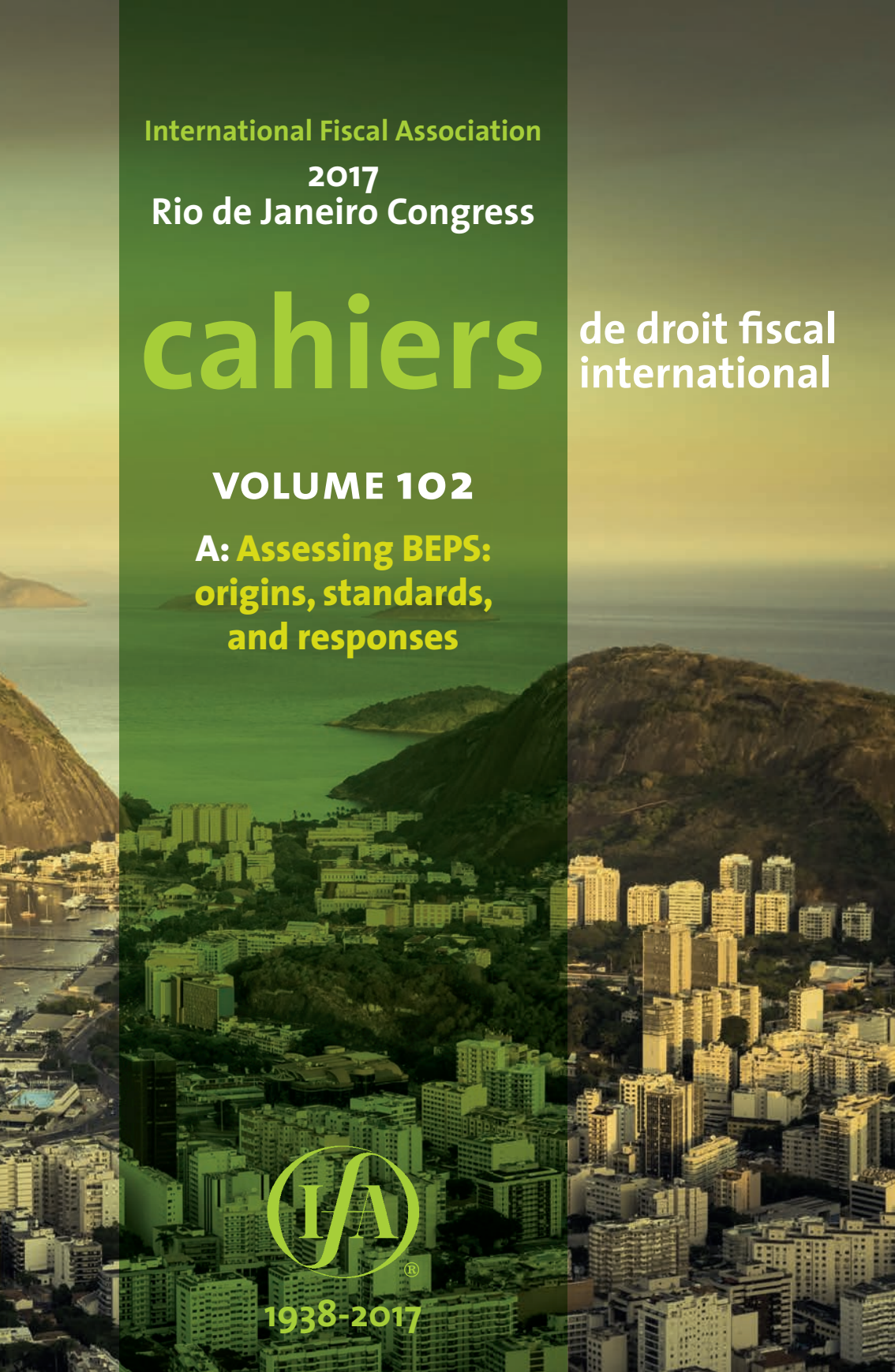
A: Assessing BEPS: origins, standards, and responses



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Mauritius

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Summary

The mobility of capital arising from technological developments and the relaxation of exchange controls has led to tax competition, in which sovereign countries lower their tax rates on income earned by foreigners within their borders in order to attract both portfolio and direct investment. Tax competition, in turn, threatens to undermine individual and corporate income taxes, which remain major sources of revenue for countries.

Offshore tax evasion is a serious problem for all jurisdictions, receiving heightened political attention since the onset of the global financial crisis. More recently, international leaders have focused on the automatic exchange of tax information as a key opportunity to close avenues for offshore tax evasion. Automatic information exchange enables tax administrations to detect and address evasion in cases where there had been no previous indication or evidence of non-compliance.

Offshore financial centres seem particularly to be in the line of sight of the OECD base erosion and profit shifting (BEPS) project. This can be partly explained by the business model adopted by multinational companies since the Second World War. Many of these so-called offshore centres were former British colonies with no natural resources.

The level playing field remains a generic term being used left, right and centre. However, the implementation is neither visible nor tangible. The challenge is a complex one for international policymakers to implement.

The original objectives of the BEPS Action Plan are to ensure that tax is paid where profits are created. Tax authorities around the world are ramping up, focusing on transfer pricing (TP) issues and some of them are becoming more aggressive in their methods. Moreover, other costs of implementation are changes in the domestic law and compliance with new reporting requirements and all these may cause disruptions in business.

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However, despite reassurances from the OECD, all the indications are that the BEPS project is creating tax uncertainty. The uncertain environment will prevail until such time as the project nears completion. In the meantime, businesses need to keep abreast of international tax developments, and plan to minimize any tax risks.

The OECD's BEPS project is undermining national sovereignty, according to a report from the Mercatus Center, a research centre based at George Mason University in the United States.

The report, entitled *The OECD's Conquest of the United States: Understanding the Costs and Consequences of the BEPS Project and Tax Harmonization*, noted that the project "attempts to change the international tax system by transferring control of corporate taxation from individual nations to an international body". It continued: "This shift favours consolidated and uniform tax rules but sacrifices compliance efficiency, taxpayer rights, and the ability of nations to set the tax policies best suited to their populations".[1]

Another danger is a fractured response to BEPS by individual jurisdictions, warning that a disparate approach to the OECD's recommendations threatens to slow down international trade and investment. It is recommended that governments consider the interconnectedness that helps facilitate global trade when developing their domestic policies. Any deviances from internationally agreed guidelines may create tax barriers and inhibit international trade to the detriment of one country. This may hinder global efforts to establish a consistent international tax landscape. The economic change will result in some degree of policy uncertainty; however, the quantum remains unmeasured and unassessed. There is a call for international collaborative efforts, and, more broadly, improved tax authority business practices.

Mauritius, like many other financial centres, will be affected by the BEPS project. Its tax treaties based on the OECD model will be affected by the multilateral instrument (MLI). Mauritius is actively participating in the 96 ad hoc group of countries to develop the MLI. Consideration is also being given to joining the inclusive framework.

1. Globalization

Globalization and erosion of the tax base can be attributed to a range of factors. The increasing global competition in business, with multinational companies moving to jurisdictions with lower taxation on corporate activity, is currently leading to a "race to the bottom" in corporate tax rates. The growing use of new technologies and development of electronic commerce, intra-company trade and offshore financial centres makes the monitoring of corporate activity and profits difficult, which is likely to tempt governments to lower the statutory rates, and which can have adverse consequences for tax revenues both directly and indirectly.

[1] http://www.bakertillyinternational.com/web/insights/beps-infringing-us-national-sovereignty,-report-says.aspx.

2. An overview of Mauritius

International financial centres (IFCs) provide benefits for developing countries in fostering economic growth and poverty alleviation. IFCs help connect investors by accessing the institutions necessary to drive growth through low transaction costs and thus facilitating exchange.

Some 20 years ago, Mauritius positioned itself as a financial centre. Today, after more than two decades of servicing international investors and institutional investors, Mauritius has become a mature IFC. The major features of the Mauritius IFC are mainly its wide array of tax treaties, its thousands of experienced local professionals, competitive operating costs and high level of services (in 2013 Mauritius counted 2,443 chartered accountants, 230 chartered secretaries and administrators, 36 chartered financial analysts, 591 barristers, 63 notaries, 157 attorneys). Mauritius has the highest density of ACCA members and students per head of population in the world and is, therefore, well poised to further strengthen its accountancy and financial sector. Mauritius is well known for its political and economic stability, sound legal and regulatory system and state-of-the-art infrastructure.

The Financial Services Commission, Mauritius (the FSC) is the integrated regulator for the non-bank financial services sector and the global business sector. Established in 2001, the FSC is mandated under the Financial Services Act 2007 (FSA 2007) and has a solid legal framework: the Securities Act 2005, the Insurance Act 2005, the Private Pension Schemes Act 2012 and Rules and Regulations made thereunder to license, regulate, monitor and supervise the conduct of business activities.

2.1. Legal system

The Mauritius legal system is a hybrid system which draws its legal principles both from the French *Code Napoléon* and British common law. This uniqueness derives from the previous colonial administrators, i.e. Great Britain and France.

Mauritius has a written Constitution which is the supreme law of the land. The Constitution vests law-making powers with Parliament. Any law which is inconsistent with the Constitution is void. The Constitution provides for the establishment of an independent judiciary which is based on the concept of separation of powers. The Chief Justice is the head of the judiciary. The Supreme Court of Mauritius is the superior court of the island. Subordinate courts consist of the intermediate court, the industrial court and the district court (among others). Mauritius has chosen to maintain the judicial committee of the Privy Council in England as its highest recourse of appeal.

The civil law aspects of the Mauritian legal system can be seen from the existence of various codes derived from French codes, namely the *Code Civil*, the *Code Pénal* and *Code de Commerce*. The substantive law is also of French origin. The laws of procedure and evidence are derived from English law even though provisions of the *Code de Procédure Civil* are still in force.

The common law aspects of the Mauritian legal system can be seen from the existence of the doctrine of precedent (the *stare decisis* principle) which requires the subordinate courts to apply the legal reasoning of judges in the Supreme Court

and Court of Appeal decisions where a case involves similar facts and issues. The most striking feature of the common law aspect in the Mauritian legal system is its adversarial system, which relies on advocacy by counsel for each party before the judge or jury, who are the final adjudicators.

On the regional front, Mauritius is a member the Southern African Development Community (SADC), the Common Market for Eastern and Southern Africa (COMESA) and the Indian Ocean Rim Association for Regional Cooperation (IOR-ARC). Mauritius has also signed a memorandum of understanding with the SADC on macroeconomic convergence in 2002.

2.2. Transparency

In its move towards transparency and international recognition Mauritius adheres to and complies with international standards and principles issued by international organizations. The FSC's membership and affiliations to the following international and regional standard setters demonstrate the commitment of the FSC in adhering to best practices:

International:
- the International Organization of Securities Commissions (IOSCO);
- the International Organization of Pension Supervisors (IOPS);
- the International Association of Insurance Supervisors (IAIS);
- the Regulatory Oversight Committee for the global legal entity identifier (LEI) system;
- *L'Institut Francophone de la Régulation Financière*.

Regional:
- SADC – Committee for Insurance, Securities and Non-Bank Financial Authorities (CISNA);
- Africa Middle East Regional Committee (AMERC) of IOSCO;
- Financial Stability Board (FSB) Regional Consultative Group for Sub-Saharan Africa.

2.3. The OECD assessment

Mauritius appeared on the initial list of the OECD issued in April 2009 among those jurisdictions having substantially implemented the internationally agreed tax standards. The January 2011 OECD peer review report states "It is recognized that Mauritius is putting in place a national strategy for an efficient exchange of information system, and answers most requests within 90 days".

In 2010 Mauritius voluntarily underwent both phases 1 and 2 reviews of the OECD. The OECD Global Forum rated the Mauritius phase 1 assessment on the legal and regulatory framework for transparency and exchange of information, as "all elements are in place", meaning that the legal and regulatory architecture is clearly laid down. The phase 2 ratings were released on 22 November 2013 and Mauritius has been assigned a "largely compliant" status. The phase 2 review assesses the practical implementation of the legal and regulatory framework.

3. The anti-money laundering – combating financing of terrorism (AML/CFT) framework in Mauritius

Mauritius has been a member of the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), a FATF-style regional body, since 1999. Mauritius adopted the Dangerous Drugs Act in 1995, which criminalized money laundering where the predicate offence relates to drug offences. Reinforcing its commitment to international initiatives to combat money laundering and terrorist financing, Mauritius set up in 2001–2002 a new legislative framework, namely the Financial Intelligence and Anti-Money Laundering Act 2002, the Prevention of Corruption Act 2002 and the Prevention of Terrorism Act 2002, the Convention for the Suppression of the Financing of Terrorism Act 2003, the Mutual Assistance in Criminal and Related Matters Act, the Dangerous Drugs Act and in 2011 the Asset Recovery Act. Mauritius ensures that its AML/CFT legislation is continuously upgraded to reflect the latest developments at the level of the FATF, the IOSCO and the IAIS.

4. Mauritius – a well-diversified economy

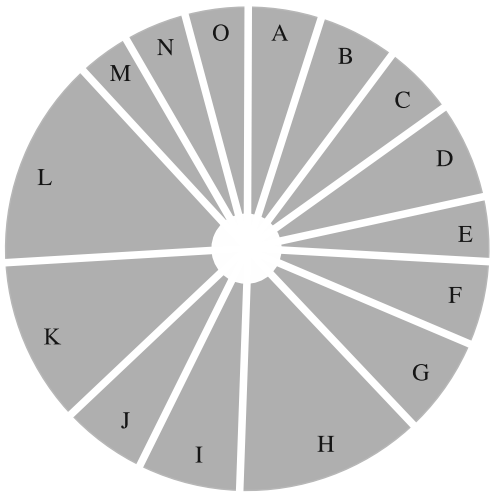
The financial sector is only part of the Mauritian diverse economy. The financial services sector accounted for 10.3 per cent of Mauritius GDP in 2012, out of which 5 per cent is generated by the non-bank financial services sector. One of the main characteristics of a tax haven is that it is usually heavily dependent on financial services; however, the statistics in Figure 1 show the opposite for Mauritius.

4.1. Paying taxes in Mauritius

Income tax is levied under the Income Tax Act 1995 on a domestic level. In so far as taxation of income is concerned, the provisions in the Income Tax Act take precedence over those in other enactments unless the Income Tax Act makes specific provisions to the contrary. Mauritius runs a self-assessment tax system. Its fiscal year starts on 1 July and ends on 30 June.

Income is taxed on a residence basis. An individual resident in Mauritius is taxable on his worldwide income unless the foreign source income is taxable on a remittance basis. Companies are taxed on their worldwide income whether remitted or not.

There is a uniform and single tax rate of 15 per cent applicable to both individuals and companies. The Mauritius tax system is based on the Income Tax Act 1995. Mauritius's general tax system has undergone a significant reform aimed to rationalize preferential tax regimes, and primarily to reduce taxes as a means of stimulating business, investment, employment and economic growth. This reform resulted in a significant rate reduction. Taxes were harmonized with effect from July 2006 to a flat rate of 15 per cent (income tax, VAT). The simplification helped to improve the tax administration and compliance. Value added taxes constitute about 40 per cent of the total taxes collected by the Mauritius Revenue Authority (MRA) (see Table 1).



A	Education	4.9%
B	Transportation and storage	5.2%
C	Professions, scientific and technical activities	4.7%
D	Public administration and defence; compulsory social security	6.5%
E	Human and social work activities	5.3%
F	Others	5.3%
G	Real estate	5.9%
H	Financial and insurance activities	12.1%
I	Accommodation services activities	6.8%
J	Transportation	6.2%
K	Wholesale and retail trade	11.1%
L	Manufacturing	14.1%
M	Agriculture, forestry and fishing	3.5%
N	Information and communication	4.2%
O	Construction	4.2%

Figure 1. Sector contribution to GDP (%) in 2012

Source: National Accounts September 2013, Statistics Mauritius

4.2. Rule of law

The rule of law is an important feature of the Mauritius legal system. Mauritius also has a strong independent judiciary. Tax disputes sometimes end up before the Supreme Court and investors often feel comforted by knowing that the Privy Council in the UK is the ultimate court of appeal.

4.3. Bilateral agreements

Mauritius has built a wide array of double taxation avoidance agreements (DTAAs), tax information exchange agreements (TIEAs) and investment promotion and protection agreements (IPPAs) negotiated over time. Table 2 shows the current status.

4.4. Embracing automatic exchange of information

In line with international cooperation/developments Mauritius has committed to the automatic exchange of information which is showcased by the signing of:

Table 1. Tax rates

Tax or mandatory contribution	Statutory rate (%)
Corporate income tax	15
Withholding tax on dividends	0
Withholding tax on interest	15
Withholding tax on royalties	10–15
Corporate social responsibility	2
VAT	15
Capital gains tax (CGT)	None

Table 2. Mauritius bilateral agreements

Bilateral agreements	
DTAAs[a]	43 in force 5 treaties await ratification 5 treaties await signature 18 treaties under negotiations
TIEAs	8 in force signed 3 await signature
IPPAs[b]	28 in force 16 await ratification

[a] http://www.mra.mu/index.php/taxes-duties/double-taxation-agreements.
[b] http://www.investmauritius.com/downloads/ippa.aspx.

- the US Foreign Account Tax Compliance Act (FATCA): the negotiation of a TIEA and a reciprocal inter-government agreement (IGA) model 1 with the US IRS on the FATCA;
- the OECD common reporting standard: Mauritius financial institutions will have to report annually to the MRA on the financial accounts held by non-residents for eventual exchange with relevant treaty partners. The first reporting period ends on 31 December 2017 and will have to be made to the MRA by 31 July 2018 for eventual exchange with the relevant treaty partners by 30 September 2018;
- Convention on Mutual Administrative Assistance in Tax Matters: Mauritius has welcomed the various efforts made in recent years to combat tax avoidance and tax evasion on an international level, whether bilaterally or multilaterally, considering that a coordinated effort between states is necessary in order to foster all forms of administrative assistance in matters concerning taxes of any kind while at the same time ensuring adequate protection for the rights of taxpayers. Mauritius also recognizes that international cooperation

can play an important part in facilitating the proper determination of tax liabilities and in helping the taxpayers to secure their rights;

- Multilateral Competent Authority Agreement (MCAA): Mauritius signed the MCAA on 29 October 2014, showcasing the jurisdiction's intent to improve international tax compliance by further building on its relationship with respect to mutual assistance in tax matters.

5. Substance requirements in Mauritius

5.1. Substance requirements for global business companies (GBCs)

The Mauritius FSC licenses management companies under section 77 of the FSA 2007. They set up, administer, manage and provide nominee and other services to a corporation (e.g. GBCs) or act as corporate trustee or qualified trustee under the Trusts Act 2001. The FSC requires that all applications for a global business licence are channelled through a licensed management company and the latter has the responsibility and obligation of vetting and carrying out due diligence.

Substance requirements are enshrined in section 71 of the FSA 2007. Furthermore, Mauritius has put in place more stringent conditions for the issuance of a tax residence certificate (TRC). A TRC must be renewed on an annual basis to ensure that, at the time of the issuance and renewal of the category 1 global business licence (GBL1), the GBC1 is managed and controlled from Mauritius.

An application for a TRC is made through the FSC. On assessment the FSC makes a recommendation to the MRA for the issuing of a TRC if it is satisfied that the required undertakings are made. TRCs are issued on very strict conditions including:

(a) the company must have at least two directors, resident in Mauritius, of sufficient calibre to exercise independence of mind and judgement;
(b) it must at all times maintain its principal bank account in Mauritius;
(c) it must keep and maintain, at all times, its accounting records at its registered office in Mauritius;
(d) it must prepare or propose to prepare its statutory financial statements and intend to have such financial statements audited in Mauritius;
(e) it must provide for meetings of directors to include at least two directors from Mauritius.

5.2. New enhanced substance

In line with government policy of enhancing the substance requirements, the FSC brought amendments to its guide to global business. The following additional requirements, where at least one criterion should be met in order to obtain a TRC, include:

- office premises: the company needs office premises in Mauritius;
- full-time employee: the company must employ one Mauritius resident at an administrative/technical level;

- arbitration: the constitution of the company must contain a clause for disputes to be resolved through arbitration in Mauritius;
- non-cash assets: the company must hold assets in Mauritius for the next 12 months, worth at least USD100,000;
- listed shares: the company must be listed on the Stock Exchange of Mauritius;
- annual expenditure: there must be a reasonable yearly expenditure in Mauritius;
- annual expenditure: the company must have or expect to have a yearly expenditure in Mauritius which could reasonably be expected from any similar company which is controlled and managed from Mauritius.

6. The final BEPS package

The final BEPS package, announced by the OECD in October 2015, sets out new minimum standards on:

- country-by-country reporting, to provide tax administrations with a global picture of the operations of multinationals;
- treaty shopping, to put an end to the use of conduit companies to channel investments;
- curbing harmful tax practices, in particular in the area of intellectual property and through the automatic exchange of information on tax rulings; and
- effective mutual agreement procedures, to ensure that the fight against double non-taxation does not result in double taxation.

6.1. The MLI

The MLI proposed to be introduced will be capable of incorporating tax treaty-related BEPS measures into the existing network of 3,500 DTAs. The financial crisis and the advent of tax information exchange are the triggering factors for making such fundamental changes to the tax landscape. All the proposed reforms are made possible today by international cooperation on tax matters.

As at 14 October 2016, 86 countries have joined the inclusive framework on BEPS. Mauritius is seriously considering joining the framework. Some 50 countries are implementing the country-by-country reporting framework proposed under BEPS Action 13. Tax treaty-related BEPS measures are being incorporated into the MLI to amend DTAs. The MLI intends to end treaty shopping (BEPS Action 6), address the issue of hybrid mismatches, attempt to update the definition of "permanent establishment" and improve dispute resolution processes.

6.2. BEPS – a game-changer

The devil could be in the detail. The project may turn out to be unsuccessful should countries implement the recommendations in an inconsistent manner. There might even be a danger of the international tax framework becoming more unpredictable. Furthermore, the ongoing implementation of the BEPS measures worldwide may cause disruptions in the business operations and also require businesses to

change, reviewing the existing model and/or restructuring their businesses models on taxation as a response to BEPS. Many companies will prefer to adopt a wait and see approach and watch the moves of their competitors. On the other hand, many governments have not yet given details about whether they will implement the BEPS measures. The implementation phase will raise a lot of questions and highlight all the grey areas of this project; businesses may not be ready to deal with retrospective legislation and the recent example of the EU action against Apple and its agreements with Ireland does not help make these tax issues any clearer for businesses.

Being the first mover in this area of uncertainty does not constitute an economic advantage to any economy. The outcomes and the future of the international tax framework are currently unpredictable. Businesses fear the increased risks of operating in a more uncertain tax environment as well as an increase in their effective tax rate. Compliance costs are anticipated to increase, along with tax burdens and business uncertainty.

6.3. Level playing field

Different countries operate different tax systems and models. Therefore meeting the intended reach of BEPS on a level playing field becomes more difficult and complex. However, in general BEPS is currently seen as a work in progress rather than a final solution.

6.4. Existing standards and responses

Out of the 15 action points from the BEPS proposals, there are 4 which are particularly relevant to Mauritius, namely:

- Action 5: countering harmful tax practices more effectively, taking into account transparency and substance;
- Action 6: preventing the granting of treaty benefits in inappropriate circumstances;
- Action 13: TP documentation and country-by-country reporting;
- Action 15: developing an MLI to modify bilateral tax treaties.

While the other 11 actions also have a bearing, to a lesser or greater extent, this report has focused on Actions 5, 6, 13 and 15, which are in the reporters' view the most pertinent to Mauritius.

7. Mauritius financial services sector: background

In the early 1990s, the government sought to make the financial services sector the fourth pillar of the Mauritian economy. The Mauritius Offshore Business Activities Act, a comprehensive legislative framework for non-banking offshore business activities, heralded the launch of the offshore sector in 1992. In the same year, the Financial Services Regulatory Authority was set up and played a crucial role in establishing and developing the offshore sector.

The now repealed Financial Services Development Act 2001 first established in Mauritius the concept of qualified global business. It was then replaced by the FSA 2007, which overhauled the concept and created companies with category 1 and category 2 licences (commonly referred to as GBC1 and GBC2 companies) which provide for the setting up of companies benefiting from a host of advantages.

The FSA 2007 provides a common framework for the licensing and supervision of all financial services other than for the banking and the global business sectors. Modern legislation enacted includes the Companies Act 2001, the Trusts Act 2001, the Financial Intelligence and Anti-Money Laundering Act 2002, the Income Tax Act 1995, the Protected Cell Companies Act 1999, the Securities Act 2005, the Insurance Act 2005 and now more recently the Captive Insurance Act 2015. These pieces of legislation have been instrumental in making Mauritius a thriving and secure jurisdiction for financial services.

GBC1 and GBC2 companies are administered by management companies (local corporate service providers) and are regulated by the Mauritius Financial Services Commission (MFSC). GBC companies have to comply with a number of requirements in order to qualify for a licence. These requirements are examined in more detail below.

In 2014, the FSC counted 10,306 GBC1 licensees and 11,011 GBC2 licensees.

In the light of its use as a jurisdiction of choice for inbound and outbound investment for Asia and Africa, Mauritius is at times perceived by the international community as a jurisdiction where profits are being shifted away from the jurisdictions where the value is created.

This report focuses on Actions 5, 6 and 13 with a view to assessing where Mauritius currently stands as regards the standards recommended in the BEPS proposals package.

7.1. Action 5: countering harmful tax practices more effectively, taking into account transparency and substance

This action point looks more particularly at preferential regimes which are considered as being harmful and at the lack of transparency in connection with certain rulings.

7.1.1. Harmful tax practices: preferential regimes

The OECD first published a report in 1998 entitled "Harmful Tax Competition: An Emerging Global Issue". More than 15 years have since passed and a lot of work has been carried out in identifying both preferential regimes and tax havens.

The factors identified in the 1998 report which are used to determine whether a preferential regime was harmful were classified into four key factors and additional factors.

The key factors were:

(a) the regime imposes no or low effective tax rates on income from geographically mobile financial and other service activities;
(b) the regime is ring-fenced from the domestic economy;
(c) the regime lacks transparency;

(d) there is no effective exchange of information with respect to the regime.

The eight additional factors are:

(a) an artificial definition of the tax base;
(b) failure to adhere to international TP principles;
(c) foreign source income exempt from residence country taxation;
(d) a negotiable tax rate or tax base;
(e) the existence of secrecy provisions;
(f) access to a wide network of tax treaties;
(g) the regime is promoted as a tax minimization vehicle;
(h) the regime encourages operations or arrangements that are purely tax-driven and involve no substantial activity.

The OECD first published a report in June 2000 and identified 47 potentially harmful jurisdictions and 35 tax havens. Mauritius was not identified as a harmful jurisdiction or a tax haven in the 2000 report; it was actually cited as being one of the jurisdictions which was "committed to eliminating its harmful tax practices". A further report was published in 2004. In the 2004 report, Mauritius is cited as having worked with the OECD for having implemented effective exchange of information. Mauritius is not cited in the next OECD report which was issued in 2006. In fact, by 2006, most of the regimes which had originally been cited in the 2000 report had been abolished, amended or found not to be harmful following further analysis.

Action 5 of the BEPS proposal package revamps the concept of harmful tax practice with a "priority and renewed focus on requiring substantial activity for any preferential regime and on improving transparency, including compulsory spontaneous exchange on rulings related to preferential regimes". Action 5 puts increased emphasis on the "substantial activity" criterion, along with the other four key factors identified in the 1998 report.

This action point deals with preferential regimes in the context of intangible property (IP) and non-IP regimes. Generally, companies resident in Mauritius for tax purposes are taxed at the rate of 15 per cent.[2] They are generally entitled to claim credit for underlying tax incurred on foreign income.

GBC1 companies are entitled to a deemed tax credit of 80 per cent of their taxable profits. GBC1 companies are therefore subject to an effective tax rate not exceeding 3 per cent. This deemed foreign tax credit applies regardless of the type of foreign income earned by the company.

The concerns around preferential IP regimes do not apply in the Mauritius context.

As regards non-IP regimes, the type of regime which may be the most relevant to Mauritius is the "holding company regime".[3] The Action 5 final report identifies these regimes as being problematic if there is no substantial activity in relation to the core activities associated with the types of income typically earned by those companies (such as interest, dividends, rents, royalties).

One key requirement for the grant of a GBC1 licence is that at least 50 per cent of the activity of the company must be conducted outside Mauritius. The deemed foreign tax credit will only apply to income derived abroad. While the

[2] Some exceptions apply. GBC2 companies are exempt from tax on their income but they are not treated as being resident in Mauritius for DTA purposes.

[3] Paras. 86–88 of the Action 5 final report.

deemed foreign tax credit does not only apply to holding companies, in practice, many GBC1 companies will be investment holding companies.

However, a GBC1 must comply with a number of requirements in order to satisfy the FSC that it is managed and controlled in Mauritius.

Pursuant to section 71(4) (a) and (b) of the FSA 2007 and paragraph 3.2 of chapter 4 of the guide to global business, the FSC will have regard to certain requirements in order to assess whether a company is centrally managed and controlled in Mauritius (the "mandatory requirements"). In addition, paragraph 3.3 of chapter 4 of the guide issued by the FSC contains additional substance requirements.

These requirements are as follows:

(a) the company has at least two directors resident in Mauritius, who are appropriately qualified and are of sufficient calibre to exercise independence of mind and judgement;
(b) the company must at all times maintain its principal bank account in Mauritius;
(c) the company must keep and maintain, at all times, its accounting records at its registered office in Mauritius;
(d) the company must prepare, or intend to prepare, its statutory financial statements and cause or propose to have such financial statements audited in Mauritius;
(e) the company must provide for meetings of directors to include at least two directors from Mauritius;
(f) one of the following additional substance requirements must be met:[4]
  - the company has office premises in Mauritius;
  - the company employs on a full-time basis at administrative/technical level at least one person who is resident in Mauritius;
  - the company's constitution contains a clause whereby all disputes arising out of the constitution are resolved by way of arbitration in Mauritius;
  - the company holds, or is expected to hold, within the next 12 months assets (excluding cash held in bank account or shares/interests in another corporation holding a GBL) which are worth at least USD 100,000 in Mauritius;
  - the company's shares are listed on a securities exchange licensed by the Commission;
  - it has or is expected to have a yearly expenditure in Mauritius which could reasonably be expected from any similar corporation which was controlled and managed from Mauritius.

To the extent that GBC1 companies are purely investment holding companies, they should not be treated as a harmful preferential regime within the meaning of the Action 5 final report since what is required from these companies is to "have the substance necessary to engage in holding and managing equity participations".[5] The requirement for two local resident directors who will actively participate in the management and control of the GBC1 (in addition to the other mandatory requirements) will preclude "the possibility of letter box and brass plate companies". However, other action points may be relevant to such companies (such as Action 6 (preventing treaty abuse) and Action 3 (controlled foreign company (CFC) rules)).

[4] S. 3.3 of chapter 4 of the revised guide to global business.
[5] Para. 88 of the Action 5 final report.

To the extent that GBC1 companies earn other types of income (e.g. royalties, management fees, advisory fees), there is currently no mandatory requirement for the GBC1 to have engaged in the core activities associated with those types of income (other than the substance requirements highlighted above). However, the GBC1 may require other licences from the FSC in order to be able to carry out such activities. For example a GBC1 charging advisory fees may require an investment adviser licence. The requirements for such a licence would need to be met.

While Mauritius has not been identified previously by the OECD as having a harmful tax regime, it continues to strive to uphold its reputation as a robust and secure financial services platform.

New categories of licences from the FSC have been introduced through the Finance (Miscellaneous Provisions) Act 2016 to further bolster substance and promote investment in Mauritius. These include in particular the global headquarters administration licence and the treasury management centre licence.

Mauritius continues to review its deemed foreign tax credit rules. The government of Mauritius has set up a domestic technical committee to review the existing regime and to analyse and to propose alternative models that are appropriate for the Mauritius context and which are acceptable internationally. The authorities continue to work closely with industry bodies (such as bodies representing management companies) and the Big Four and other stakeholders in order to identify a suitable alternative.

Mauritius appeared arbitrarily in the EU so-called "blacklist" in 2015 on the basis of 10 EU countries blacklisting Mauritius. The government of Mauritius vigorously objected to the EU and Mauritius was ultimately removed from that list. The government has already initiated a dialogue with the European Commission to ensure that any possible replacement of the foreign deemed tax credit system is acceptable to the European Commission. In October 2016 a delegation of officials from Mauritius, including the Minister of Finance and Economic Development, paid an official visit to Brussels to discuss, among other things, the position of Mauritius as a safe, cooperative and robust jurisdiction.[6]

7.1.2. Transparency in the context of tax rulings

Another key priority under Action 5 is to set out a framework for compulsory spontaneous exchange of tax rulings in view of ensuring greater transparency. The obligation to spontaneously exchange applies not only to future rulings but also to any past rulings issued on or after 1 January 2010 (and still in effect as of 1 January 2014). The relevant authority should transmit rulings within three months of the ruling becoming available (unless there is a legal impediment to such exchange). The process for implementing spontaneous exchange of tax rulings should be implemented by the end of 2016.

The legislative framework in Mauritius allows for the application for rulings by a taxpayer. Section 159 of the Income Tax Act 1995 empowers any person who "derives or may derive any income" to apply to the Director General for a ruling as to the application of the income tax rules to his income.

[6] http://europa.eu/rapid/press-release_CLDR-16-3496_en.htm.

Upon receipt of the application for a ruling (with the full details of the transaction), the Director General will issue a ruling which will be binding. The Director General will publish the ruling in "such manner as he thinks fit"[7] without disclosing the identity of the applicant.

Mauritius is currently a party to a number of TIEAs. So far eight such agreements (with Australia, Austria, Denmark, Finland, Guernsey, Norway, Iceland and the USA) are in force. Three agreements (with the Faroe Islands, Greenland and South Korea) have been signed and a further three (with Argentina, Greece and the Isle of Man) await signature.

Several observations can be made in relation to the existing TIEAs:

(a) information is provided upon request by the competent authority of one contracting country to the competent authority of the other contracting country. They do not provide a mechanism for spontaneous exchange;
(b) the information that can be requested by a competent authority is broadly worded and would in principle include a tax ruling;[8]
(c) there is typically a confidentiality clause which states that

> "any information received by a contracting state under this agreement shall be treated as confidential and may be disclosed only to persons or authorities (including courts and administrative bodies) in the jurisdiction of the contracting state concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of judicial review or appeals in relation to, the taxes covered by this agreement. Such persons or authorities should use such information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. The information may not be disclosed to any other person or entity or authority or any other jurisdiction without the express written consent of the competent authority of the Requested State".

This is in line with the spontaneous rulings exchange framework contemplated by Action 5. Paragraph 138 of the Action 5 final report states that "all treaties and exchange of information instruments contain provisions regarding tax confidentiality and the obligation to keep information exchange confidential".

To date, only the TIEA between Mauritius and the United States contains a provision for spontaneous exchange of information.[9] The other TIEAs only provide for exchange of information on request.

7 Ss. 6 of s. 159 of the Income Tax Act.

8 Information that can be requested (in the TIEAs which are currently in force) is information "that is foreseeably relevant to the administration and enforcement of the domestic laws of those States concerning taxes". Information is defined as meaning "any fact, statement or record in any form whatever".

9 Art. 7 of the TIEA between the Republic of Mauritius and the United States of America.

8. Action 6: preventing the granting of treaty benefits in inappropriate circumstances

Action 6 is perhaps the most relevant to Mauritius: the island has been on the receiving end of negative media perception in the past few years that the choice of Mauritius as a jurisdiction for investment holding is purely driven by tax reasons.[10] Although the Indian tax authorities have never been successful in challenging the use of Mauritius as an investment holding jurisdiction for investment into India, there have been numerous lengthy court cases on this issue.

Mauritius currently has an extensive DTA network. The regular use of Mauritius as a platform for inbound and outbound investment in India and Africa raises the legitimate concern that this is an unacceptable form of treaty abuse which is in fact depriving a number of developing countries of tax revenues.

Before delving into the proposals put forward by the Action 6 final report, it is useful to elaborate on the context in which Mauritius is used as an investment platform. While it is true that it has a generous network of DTAs, there are a number of other reasons which render the choice of Mauritius a compelling one:

(a) Mauritius has concluded 28 IPPAs, also known in other countries as bilateral investment treaties. These provide invaluable protection to foreign investors, in particular when investing in the African continent where the risk of expropriation is not negligible;
(b) it has a stable political and legal environment, with the highest court of appeal being the UK Privy Council;
(c) it forms part of a number of regional organizations such as SADC and COMESA, which facilitates trade and investment among a number of African countries;
(d) it possesses a highly skilled, educated and bilingual (English and French) workforce;
(e) it has a sophisticated banking system with a number of international banks established there;
(f) the framework for GBCs is robust, transparent and well regulated. Stringent substance requirements (as discussed above) should be satisfied before a GBC1 company is treated as being managed and controlled in Mauritius.

Notwithstanding these factors, the Action 6 final report purports to set the bar even higher as regards the eligibility for treaty relief.

The Action 6 final report puts forward certain minimum standards which would need to be met as regards the prevention of treaty abuse. The overarching goal is for countries to put an express statement in the DTAs that they are entered into with the aim of avoiding double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance. The Action 6 final report recommends that this can be achieved either (a) through a limitation of benefits clause (LOB clause); (b) a prinipal purpose test (PPT) clause; or (c) a combination of both.

[10] See for example, Action Aid article: https://www.actionaid.org.uk/latest-news/deloitte-advised-big-business-on-how-to-avoid-tax-in-some-of-the-poorest-countries-in.

LOB clauses are not an entirely new concept to the Mauritius treaty network. The DTAs with the following countries contain some form of LOB clause: Sweden (article 26, limitations on benefits), India (the 2016 protocol amending the DTAA between India and Mauritius contains an LOB clause) and Luxembourg (treaty benefits are limited to Mauritius residents which are subject to tax at the rate of 15 per cent calculated on a basis computed in accordance with Luxembourg income tax law). In addition, a PPT clause can also be found in the double tax treaty between Mauritius and Germany (article 22, special provisions).

The incorporation of an LOB clause and/or a PPT clause in the DTAAs of Mauritius is likely to have a significant impact on the global business industry in Mauritius in its current form.

The report has examined in turn the two forms of anti-treaty abuse provisions and their potential impact on Mauritius.

8.1. LOB clause

The Action 6 final report contains draft LOB clauses, in a simplified and detailed version. The concept behind an LOB clause is to deny treaty benefits for people who are not "qualified persons". Qualified persons are defined very strictly and would include individuals, states, certain listed entities, certain charities and pension funds, certain collective investment vehicles and other entities which meet certain ownership requirements. The draft LOB clause also allows treaty benefits to be granted to persons who are not qualified persons but who are engaged in the "active conduct of a business in its state of residence and the income is derived in connection with, or is incidental to, that business".

GBCs which are principally investment holding companies are unlikely to meet the objective requirements of the proposed LOB clause. The commentary on the LOB clause provides some helpful guidance as to the meaning of "business".[11] Although "business" is not defined, "an entity generally will be considered to be engaged in the active conduct of a business only if the person through whom the entity is acting (such as officers or employees of a company) conducts the substantive managerial and operational activities". The guidance goes on to clarify that "since a headquarters operation is in the business of managing investments, a company that functions solely as a headquarters company will not be considered to be engaged in the active conduct of a business". Further, it is important to note that "an item of income is derived in connection with a business if the income-producing activity in the State of source is a line of business that 'forms a part of' or is 'complementary to' the business conducted in the State of residence by the income recipient". Unless a GBC also performs significant other activities directly related to the income it receives from abroad, it is unlikely to qualify for treaty relief under the current draft LOB clause.

The Mauritius Finance Act 2016 has introduced the concept of a global headquarters administration licence and defines it as follows. A global headquarters administration is defined in Part III of the Second Schedule of the FSA as:

[11] S. A para. 47.

> "the provision of at least three of the following services to at least three related corporations:
> - administration and general management;
> - business planning and development and coordination;
> - economic or investment research and analysis;
> - services related to international corporate headquarters in Mauritius;
> - such other global headquarters administration services as may be specified in FSC rules."

Global headquarters administration has been introduced with a view to promoting investment and enhancing substance creation in Mauritius. The activities of the headquarters entity are unlikely to qualify as being the "active conduct of a business" within the meaning of the OECD draft.

The disadvantage of adopting such an objective LOB clause is that the motive behind the choice of a jurisdiction is not examined substantively and this may produce the skewed result of denying treaty benefits where a structure is not tax driven. As highlighted above, while a good tax treaty network is certainly one of the factors a person may look at when identifying the jurisdiction for investment, there may be other (more important) factors such as the protection of investment, ease of doing business, and a stable legal and political system.

8.2. PPT clause

The Action 6 final report contains a draft PPT clause that denies the benefit under a DTA "if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit".

The PPT approach looks at the purpose behind a particular structure or arrangement. While the test looks at the factual set of circumstances in order to assess a structure objectively, it attempts to identify the purpose of a transaction or structure. In other words, the question to be answered is whether tax is the main driver for a structure or transaction.

The Action 6 final report's guidance on the draft PPT clause states that:

> "it is important to undertake an objective analysis of the aims and objects of all persons involved in putting that arrangement or transaction in place or being a party to it. What are the purposes of an arrangement or transaction is a question of fact which can only be answered by considering all circumstances surrounding the arrangement or event on a case by case basis."

It is interesting to note that the draft PPT clause in the Action 6 final report looks at whether the benefit was "one of the principal purposes" of a structure. This means that obtaining the benefit under a tax treaty need not be the sole or dominant purpose of a structure provided that it was at least one of the principal purposes. For an investment holding company set up in Mauritius to invest in, say Mozambique, it would be harder to pass the PPT test if tax was one of the main purposes behind the choice of Mauritius, even if the choice was also driven by other equally important non-tax reasons. On the other hand, where an arrangement is linked to a core

commercial activity and its form is therefore not driven mainly by obtaining a tax benefit, then the PPT test is likely to be passed.

Example G[12] is very pertinent in the Mauritius context. This example illustrates the scenario of a company which acts as a regional company for the purposes of providing group services to its subsidiaries such as management services (accounting, legal and human resources) and financing and treasury services (such as currency hedging). In this scenario, the choice of the jurisdiction for the regional company is driven by its skilled labour force, reliable legal system, business friendly environment, political stability, member of regional grouping, sophisticated banking industry and comprehensive treaty network. The guidance under Example G makes it clear that merely reviewing the effects of treaties in force would not inevitably lead to the conclusion that the main purpose behind the choice of jurisdiction was for tax. On the basis that the regional company is exercising real economic functions, using real assets and assuming real risks, and with real personnel in the group, the PPT test is likely to be passed.

While the current substance rules required by the FSC fall short of this standard, the trend over the past few years has been for GBCs to establish real presence in Mauritius over and above the minimum mandatory requirements. Many investment funds have set up offices in Mauritius with expatriates and locally sourced personnel administering and managing the funds. It is recognized that Mauritius has sophisticated banking and financial services systems and the attraction of living on a tropical island has been an appealing incentive for many expatriates.

8.3. PPT: the better approach?

While it remains to be seen what ends up in the MLI (see below), it would seem that from a Mauritius perspective, a PPT clause that looks at an arrangement holistically and the underlying considerations rather than by applying a mathematical formula would be more beneficial for the future of the global business industry. Understandably there was in the drafting of the clause an intention to cast the net wide enough. However, the way the PPT is drafted is fraught with uncertainty and will lead to litigation before the courts between the taxpayer and the revenue authority on that point alone.

9. Action 13: TP documentation and country-by-country reporting

Action 13 contains updated standards for TP documentation and a template for country-by-country reporting of income, taxes paid and certain measures of economic activity. The guidance provides a three-tiered standardized approach to TP documentation, through the provisions of a "master file", a "local file" and a country-by-country report. Taken together, the aim of these documents is to require taxpayers to articulate consistent TP positions and to provide the relevant tax authorities with useful information to assess TP risks.

[12] S. A p. 62 of the Action 6 final report.

While there is no TP or thin capitalization legislation as such in Mauritius, there is an arm's length principle contained in section 75 of the Income Tax Act.

Section 75 reads as follows:

"75. Application of arm's length test

(1) This section shall apply to any case where:
  (a) any business or other income earning activity carried on in Mauritius:
    (i) is controlled by a non-resident; or
    (ii) is carried on by a non-resident company or by a company in which more than one half of the shares are held by or on behalf of a non-resident; or
  (b) in the carrying on of any business or other income earning activity in Mauritius any person controlling that business or activity, by reason of his relationship or otherwise with any other person, is not in the opinion of the Director-General at arm's length with that person with respect to any commercial or financial transaction; and
  (c) it appears to the Director-General that the business or other income earning activity in Mauritius produces no net income or less than the amount of net income which in the opinion of the Director-General might be expected to be derived from that business or activity.

(2) Where the conditions specified in subsection (1) are satisfied, the net income of any person carrying on a business or other income earning activity in Mauritius shall be the amount which the Director-General determines would have been derived from that business or activity, had all its commercial and financial transactions and relations been wholly at arm's length."

There is no published practice note issued by the MRA on the application of the arm's length principle contained in section 75 of the Income Tax Act. However, this principle is routinely referred to in tax rulings[13] and in case law.

In addition, the arm's length principle is also contained in the general anti-avoidance rule under section 90 of the Income Tax Act. One of the factors that the MRA will have regard to is "(f) whether the transaction has created rights or obligations which would not normally be created between persons dealing with each other at arm's length under a transaction of the kind in question".[14]

The arm's length principle has been tested in case law,[15] often in the context of the general anti-avoidance rule.

While there is no published guidance, it is understood that taxpayers and the MRA will look to OECD guidance when considering TP issues.

The aim of Action 13 is for countries to be able to exchange such reports on an automatic basis. To that effect, a Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reporting (CbC MCAA) has been devised and as at 21 October 2016 had 49 signatory countries. Mauritius has not yet signed up to the CbC MCAA but is a signatory of the Multilateral Competent Authority

[13] For instance Tax Ruling 85 gives some guidance as to the application of the arm's length principle in the determination of the deductibility of interest employed in the expenditure of capital.

[14] S. 90(1)(f) of the Income Tax Act.

[15] *MRA* v. *E A L Lin Man Sons* 2015 SCJ 144 and *Robert Le Maire* v. *MRA* 2011 SCJ 17.

Agreement on the Exchange of Financial Information (for the purposes of the implementation of the common reporting standard).

For the purpose of complying with its obligation under FATCA and CRS, a new subsection (5A) has been added to section 76 of the Income Tax Act, to the effect that:

"(a) the Director-General may require any person to:
  (i) establish, maintain and document such due diligence procedures as the Director-General may determine;
  (ii) provide the Director-General with information of a specified description;
(b) any information required under subparagraph (ii) shall be provided to the Director-General at such time and in such form and manner as he may determine."

While the provisions were enacted for the purpose of FATCA and CRS, they are broadly drafted and would also apply to exchange of information for the purposes of any obligations under Action 13, without the need to further amend the primary legislation.

10. Action 15: developing an MLI to modify bilateral tax treaties

Action 15 provides for the development of an MLI to enable countries that wish to do so to implement measures developed in the BEPS package and amend all existing bilateral treaties. This action is a revolutionary approach in international taxation. Although precedents for modifying bilateral tax treaties exist in various other areas of public international law, it has never been done in the tax field. The Action 15 report concludes that an MLI is both desirable and feasible. A mandate for the formation of an ad hoc group to develop the MLI was approved by the OECD Committee on Fiscal Affairs in February 2015. The aim is to have the MLI ready for signature by December 2016.

The ad hoc group comprises 96 members from OECD and G20 countries, developing countries and non-OECD/non-G20 economies, all participating in the work on an equal footing. Mauritius forms part of the ad hoc group negotiating the MLI.[16]

One of the main provisions which will be incorporated in the MLI is the one dealing with the recommendations set out in Action 6 (treaty abuse). Achieving a coherent and workable compromise will certainly be hard to achieve.

The development and implementation of the MLI will undoubtedly pose numerous technical challenges. The Action 15 report stresses the need for the MLI to retain some flexibility to allow various countries to remain in line with their tax policies and to retain some degree of sovereignty over their tax framework.

[16] http://www.oecd.org/tax/treaties/multilateral-instrument-for-beps-tax-treaty-measures-the-ad-hoc-group.htm.

However, this could result in asymmetrical positions between two countries and undesirable results.

Taking the example of the recently renegotiated DTA between Mauritius and India, both Mauritius and India are in the ad hoc group devising the MLI. The new treaty amended the allocation of taxing rights with respect to gains on Indian shares. Gains made by Mauritian residents on Indian shares will now be taxable in India if the shares were acquired on or after 1 April 2017. There is a partial exemption if the shares were acquired after 1 April 2017 but disposed of before April 2019. However, this exemption is subject to an LOB clause which requires the Mauritian resident to have met a minimum threshold of substance in Mauritius.[17] It is unclear whether the provisions of the MLI as regards treaty abuse (whether in the form of an LOB clause or a PPT clause) would override those of the renegotiated treaty.

Furthermore, it is conceivable that Mauritius may prefer to opt for a detailed LOB clause while India may opt for a PPT clause in the MLI. The asymmetrical result would be at odds with the provisions of the newly renegotiated DTAA and defeat the intentions of the two states *vis-à-vis* one another.

The above considerations will become relevant once Mauritius decides (with its 43 treaty partners) what tax treaties will be "covered" by the MLI.

[17] The total expenditure of the Mauritian resident company's operations in Mauritius should be at least USD 40,000 in the 12 months immediately preceding the alienation of shares.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